In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 380

EVERETT ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 345 F. 2d 1007.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1965. Mr. Justice White extended the time for the filing of a petition for a writ of certiorari to and including July 23, 1965, and the petition

was filed on July 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit in evidence certain documents bearing petitioner's signature.

2. Whether petitioner's motion for acquittal was properly denied.

3. Whether certain of the trial court's instructions to the jury, including a supplemental instruction based upon the instruction approved in *Allen* v. *United States*, 164 U.S. 492, 501, were improper.

4. Whether the trial court erred in denying petitioner's motion for a new trial based on newly discovered evidence.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Kansas of willfully and knowingly making a false statement in an application for a loan to Larned Production Credit Association for the purpose of influencing that Association, in violation of 18 U.S.C. 1014 (R. 17). He was sentenced to imprisonment for a period of two years (R. 18). The court of appeals affirmed the conviction (Pet. App. B).

The evidence showed that petitioner came to the office of the Larned Production Credit Association on January 12, 1961, to make an application for a loan (R. 35-37). Mr. Hammond, manager of the Association, told petitioner "he would need to complete a

financial statement and loan application" (R. 37). Mr. Hammond asked petitioner the questions on the loan application and entered the answers, and petitioner signed the completed form (R. 37-41, 59, 64, 113).[1] The total amount of liabilities listed by petitioner under questioning by Mr. Hammond was $30,000 owed to the Trego Wakeeney Bank (R. 40, 70-71, 77-79, 113-115). In fact, at the time the application was signed by petitioner he had additional outstanding unsecured debts amounting to some $169,620 (R. 89-96, 101, 113-115).

On January 17, 1961, the executive board of the Association considered petitioner's application and, in reliance on the information given, approved a loan of $30,000 (R. 44-45, 81-82, 86-87). Petitioner signed a note dated January 17, 1961, for $31,580 and executed a draft on the account of the Production Credit Association for $30,000 on January 18, 1961 (R. 42-44, 65).

ARGUMENT

1. Petitioner contends (Pet. 4) that documents bearing his signature should have been excluded from evidence on the ground that the government had failed to deliver copies of them to him in accordance with

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[1] Petitioner indicated that he would like to borrow up to $70,000 but would take whatever the Association felt could be advanced (R. 41). As a result, certain items, such as amount of loan, purchase of stock, the maturity date and repayment dollars, were left blank (as undetermined) until the executive board could meet to approve the definite amount of the loan (R. 69-70, 76).

the orders of the trial court. The record shows that at a hearing on petitioner's motion for a bill of particulars held on December 28, 1960, the following took place (R. 29-30):

> The Court: Well, do you have a signed application by [petitioner] that he hasn't got access to? He is entitled to anything he signed. If he signed something, I think he is entitled to that. The balance of the motion will be overruled.
>
> Mr. Grist [defense counsel]: I think that is true. I don't believe they furnished us with a copy of the application.
>
> The Court: I think that is all he is entitled to.
>
> Mr. Gradert [government counsel]: Anything that bears his signature, for instance, the application, I would be glad to furnish him copies of that.
>
> The Court: That or anything that he signed on which the contention is based, I think he is entitled to a copy of it or should see it. He should have a copy of it, anyway. But if he hasn't let him have it.

Government counsel understood the ruling to mean that upon request the government was to permit inspection by, or furnish copies to, petitioner of any papers signed by petitioner to which he did not have access. The government stood ready to comply at all times, but no request was ever made.[2] Instead, at

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[2] The documents in question include the loan application and various notes of indebtedness signed by petitioner. The order of the court was never formally entered and no time for compliance was fixed as contemplated by Rule 16, F. R. Crim. P.

trial some five months later petitioner sought to exclude such documents when introduced as part of the government's case. It is apparent from the record that the order of the court contemplated that petitioner would take the initiative in ascertaining which documents, if any, he wished to request. Since all of the documents in question had been signed by petitioner, it was reasonable for government counsel to assume (in the absence of any request) that copies were in his possession or otherwise accessible to him. At all events, petitioner has made no showing that failure to deliver copies of the papers prejudiced him. In the circumstances, the trial court properly admitted the documents (R. 37-38).

2. Contrary to petitioner's contention (Pet. 2, 5), the evidence was sufficient for the jury to find beyond a reasonable doubt that petitioner willfully and knowingly made a false statement of his liabilities in the loan application for the purpose of influencing the Association in approving his loan (See Statement, *supra*).

3. Petitioner's contentions that some of the instructions to the jury (Pet. 2, 5-6) were improper are without merit.

a. Petitioner asserts that the following instruction required the jury, as a matter of law, to find against petitioner on an essential disputed issue of fact (R. 11):

> In this case, the defendant, Everett Robinson testified that he signed the application to the Larned Production Credit Association on Janu-

> ary 12, 1961, and therefore the jury are entitled to draw from that fact the inference that he had knowledge of the information it contained at the time he signed it.

The uncontradicted evidence shows that Mr. Hammond went through the application with petitioner, question by question, filling it in with information supplied by petitioner, and that petitioner then signed it. The judge told the jury merely that they were "entitled" to draw the inference of knowledge of the contents of the document at the time of signing from the fact of the signature. On the evidence here, such an inference was clearly reasonable and the instruction was, therefore, proper.

b. Upon receiving a communication from the jury that they could not agree, the court instructed them in language substantially the same as that approved by this court in *Allen* v. *United States*, 164 U.S. 492, 501-502, on the importance of reaching a verdict and the methods and attitudes applicable to jury deliberations (R. 129-131). It also stated (R. 131):

> You are not partisans. You are judges, you are judges of the facts. And your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive judges of the credibility of all the witnesses, and the weight and effect of all the evidence. In performing this high duty you are at liberty to disregard all the comments of both the Court and Counsel, including, of course, the remarks I am now making to you. But, remember at all times that no Juror is expected to yield a conscientious conviction he or

> she may have as to the weight or effect of the evidence, but also remember that after full deliberation, after full consideration and deliberation of all the evidence, it is your duty to agree upon a verdict if you can do so without violating your individual judgment or your conscience.

It has long been settled that a court may give the familiar *Allen* charge, if, as here, it makes plain that no juror is merely to acquiesce in the conclusion of his fellows or yield a conscientious conviction that he may have upon the evidence. See *Kawakita* v. *United States*, 343 U.S. 717; *Lias* v. *United States*, 284 U.S. 584.[3] In addition, the record does not indicate that petitioner made timely objection; hence, he cannot now complain. Rule 30, F. R. Crim. P.

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[3] Use of the *Allen* instruction was one of the alleged errors cited to this Court in *Kawakita*. See Brief for Petitioner, No. 570, October Term, 1951, 160-169. The Court disposed of the contention by grouping it with other alleged errors of which it said "they are either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice." 343 U.S. at 744. In *Lias*, this Court affirmed the judgment of the court of appeals *per curiam*, simply citing *Allen*. The instruction has also been upheld in every circuit that has considered it. *E.g.*, *United States* v. *Kahaner*, 317 F.2d 459, 483-485 (C.A. 2), certiorari denied, 375 U.S. 835, 836; *United States* v. *Upchurch*, 286 F.2d 516, 518 (C.A. 4); *Andrews* v. *United States*, 309 F.2d 127 (C.A. 5), certiorari denied, 372 U.S. 946; *United States* v. *Barnhill*, 305 F.2d 164 (C.A. 6), certiorari denied, 371 U.S. 865; *United States* v. *DeLucia*, 262 F.2d 610, 616 (C.A. 7), certiorari denied, 359 U.S. 1000; *Holdridge* v. *United States*, 282 F.2d 302, 311 (C.A. 8); *Zamloch* v. *United States*, 193 F.2d 889, 893 (C.A. 9), certiorari denied, 343 U.S. 934; *Mills* v. *Tinsley*, 314 F.2d 311 (C.A. 10), certiorari denied, 374 U.S. 847; *Bord* v. *United States*, 133 F.2d 313, 315 (C.A.D.C.), certiorari denied, 317 U.S. 671.

4. Petitioner made a motion for a new trial based on newly discovered evidence. This was supported by an affidavit of the lady who was the Association's bookkeeper at the time petitioner's loan was being considered (R. 21-23). She stated that some time in January 1961 a draft drawn by petitioner had come in to the Association, but that she had been unable to find a loan application or loan commitment in petitioner's file. When she inquired of Mr. Hammond, he said that he did not yet know what the loan commitment would be and instructed her to post the draft as principal. About two weeks later a second draft drawn by petitioner was received and given the same treatment. Some two weeks thereafter petitioner's application was placed in his file. Petitioner urges that this affidavit shows "that the loan commitment had been determined prior to the loan application by petitioner was filed" (Pet. 6). The affidavit shows no more than the undisputed fact that the amount of the loan requested was not fixed when the application was filed.[4] It was uncontroverted at trial that petitioner, on January 12, 1961, submitted the application approved in the amount of $30,000 on January 17, 1961. Petitioner himself testified that he did not know the amount of the loan or receive any funds until he got the first draft for the $30,000 on January 18, 1961 (R. 115-116). In these circumstances,

[4] The affidavit does suggest that the Association continued to consider petitioner's desire for additional funds after January 17, 1961. In fact, a second loan was made later but it was not considered material to the present indictment and was not pursued at trial (R. 72).

the trial court did not abuse its discretion in refusing to grant a new trial on the ground asserted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965.

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